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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGER WAYNE DALY,

Defendant and Appellant.

F078500

(Super. Ct. No. F07902652)

**OPINION**

**THE COURT\***

APPEAL from an order of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Michael L. Pinkerton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Poochigian, J. and Detjen, J.

Appellant Roger Wayne Daly appeals from the trial court's denial of his motion pursuant to Proposition 47 to reduce his 2007 conviction for possession of a stolen vehicle (Pen. Code, § 496d)<sup>1</sup> to a misdemeanor. We affirm.

### **FACTS**

On May 1, 2007, Daly pled guilty to receiving a stolen vehicle, a felony.

On October 15, 2018, Daly filed a petition for reduction of felony conviction pursuant to section 1170.18, asking the court to reduce his 2007 receiving a stolen vehicle conviction and several other felony convictions to misdemeanors.

On December 3, 2018, the trial court denied the petition with respect to some of Daly's convictions, including his 2007 receiving a stolen vehicle conviction.

### **DISCUSSION**

Proposition 47 redefined as misdemeanors certain drug and theft offenses that were felonies or wobblers, unless they were committed by certain ineligible offenders. Daly contends that even though section 496d is not specifically listed as one of these offenses, the court erred when it denied his petition to reduce his 2007 receiving a stolen vehicle conviction to a misdemeanor. He relies on *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), and *People v. Williams* (2018) 23 Cal.App.5th 641 (*Williams*) in support of this contention. We disagree.

"Proposition 47 was passed by voters at the November 4, 2014, General Election, and took effect the following day. The measure's stated purpose was 'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment,' while also ensuring 'that sentences for people convicted of dangerous

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

crimes like rape, murder, and child molestation are not changed.’ (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70 (Voter Information Guide).) To these ends, Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies, depending on the offender’s criminal history.” (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597; accord, *People v. Martinez* (2018) 4 Cal.5th 647, 651.) Specifically, it expressly redefined numerous offenses including theft of, or receiving, property worth \$950 or less. (§§ 490.2, subd. (a), 496, subd. (a); *DeHoyos, supra*, 4 Cal.5th at pp. 597-598; accord, *Martinez, supra*, 4 Cal.5th at p. 651.)

“Proposition 47 also added section 1170.18, concerning persons currently serving a sentence for a conviction of a crime that the proposition reduced to a misdemeanor. It permits such a person to ‘petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with’ specified sections that ‘have been amended or added by this act.’ (§ 1170.18, subd. (a).) If the trial court finds that the person meets the criteria of subdivision (a), it must recall the sentence and resentence the person to a misdemeanor, ‘unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.18, subd. (b).)” (*People v. Morales* (2016) 63 Cal.4th 399, 404; accord, *People v. Valencia* (2017) 3 Cal.5th 347, 355.) Section 1170.18 also provides that “[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” (§ 1170.18, subd. (f).) “The ultimate burden of proving section 1170.18 eligibility lies with the petitioner.” (*Romanowski, supra*, 2 Cal.5th at p. 916; accord, *Page, supra*, 3 Cal.5th at p. 1188.)

Moreover, through its enactment of section 490.2, Proposition 47 provided that any crime of theft previously considered a felony must be reduced to a misdemeanor if: (1) the value of the stolen property does not exceed \$950; and (2) the defendant has not been convicted of a prior offense as specified in section 490.2, subdivision (a).

Proposition 47 also amended section 496, subdivision (a), to provide that any person convicted under that section of buying or receiving any stolen property where the property's value does not exceed \$950 shall be convicted of a misdemeanor, if such person has no prior convictions under section 667, subdivision (e)(2)(C)(iv) or for an offense requiring registration pursuant to section 290, subdivision (c).

Unlike the amendments it made to section 496, subdivision (a), Proposition 47 did not clearly amend the terms of section 496d, the statute under which Daly was convicted in 2007, which relates to receipt of a stolen vehicle with knowledge it is stolen. (See § 496d.) There is a split of authority on whether Proposition 47 can be construed to apply to section 496d.

In *People v. Varner* (2016) 3 Cal.App.5th 360 (*Varner*), the Fourth District Court of Appeal held Proposition 47 does not apply to section 496d, so the trial court did not err in denying the defendant's petition for resentencing of his conviction on that basis. (*Varner, supra*, at pp. 366-367.) The *Varner* court held that "section 496d is not included in section 1170.18. Moreover, there is no indication that the drafters of Proposition 47 intended to include section 496d. Construing the plain language of section 1170.18 to include section 496d would be inconsistent with our Supreme Court's determination that we may not 'add to the statute or rewrite it to conform to some assumed intent not apparent from that language.' " (*Ibid.*) In so holding, the court rejected the defendant's argument that the drafters of Proposition 47 intended to include section 496d based on the changes Proposition 47 made to the crimes of grand theft and petty theft pursuant to section 490.2. (*Varner, supra*, at p. 367.) Additionally, the court held because section 496, subdivision (a) "contains no reference to section 496d, we must assume the drafters

intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies.” (*Varner, supra*, at p. 367; see also *People v. Bussey* (2018) 24 Cal.App.5th 1056, 1062-1063 (*Bussey*), review granted Sept. 12, 2018, S250152 [holding Proposition 47 amendment reducing general crime of receiving stolen property to misdemeanor did not also reduce specific crime of receiving stolen vehicle to misdemeanor]; *People v. Orozco* (2018) 24 Cal.App.5th 667, 674, review granted Aug. 15, 2018, S249495 [same].)

However, in *Williams, supra*, 23 Cal.App.5th 641, the First District Court of Appeal held “[t]here does not seem to be any logical basis to distinguish between the receipt of stolen property [under section 496, subdivision (a)] and receipt of a stolen vehicle under Proposition 47,” particularly given that Proposition 47 “should be read broadly to effectuate the voters’ intent.” (*Id.* at pp. 649-650.) Accordingly, the *Williams* court concluded “section 496d falls within Proposition 47.” (*Id.* at p. 651.)

Given the plain text of the statutes, we find the *Varner* court’s analysis more persuasive. The Legislature could have expressly amended section 496d, as it amended section 496, subdivision (a), but it failed to do so. And receiving a stolen vehicle is not theft; thus, it is not encompassed in section 490.2. (See § 484 [defining theft].) Indeed, generally, a defendant cannot be convicted of both theft of a vehicle and receiving a stolen vehicle. (See *People v. Garza* (2005) 35 Cal.4th 866, 874.) Accordingly, Proposition 47 did not implicitly amend section 496d.

Our Supreme Court’s decisions in *Page, supra*, 3 Cal.5th 1175 and *Romanowski, supra*, 2 Cal.5th 903 do not compel a different result. Daly argues that *Page* “made clear that an offense does not have to be expressly listed in ... Proposition [47] in order to be qualified for relief.” (*Page, supra*, at pp. 1186-1187.) He contends that *Romanowski* held that theft of an access card information (§ 484e) qualifies for reduction because section 490.2 clearly expresses the intent to reduce punishment for certain theft crimes without regard to the way the offense and conviction was pled. (*Romanowski, supra*, at

pp. 909-910.) But *Page* and *Romanowski* dealt with crimes previously classified as grand theft and our Supreme Court considered whether stealing a particular type of property (a vehicle or access card information, respectively) could constitute petty theft. (See *Page*, *supra*, 3 Cal.5th at pp. 1182-1183; *Romanowski*, *supra*, 2 Cal.5th at p. 907.) Neither case considered Proposition 47's applicability to an offense not a pure theft, as is the case here, i.e., one not identified as a grand theft and which requires additional necessary elements beyond the theft itself. (*People v. Soto* (2018) 23 Cal.App.5th 813, 822-823.) And nothing in these opinions "suggests that section 490.2 extends to any course of conduct that happens to include obtaining property by theft worth less than \$950." (*Id.* at p. 822; see *Bussey*, *supra*, 24 Cal.App.5th at p. 1063.) Accordingly, we reject Daly's contention that the court erred when it denied his petition with respect to his 2007 conviction for receiving a stolen vehicle in violation of section 496d, subdivision (a).

#### **DISPOSITION**

The order is affirmed.